2013 IL App (1st) 110660-U

SIXTH DIVISION
September 30, 2013

No. 1-11-0660

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 17628
	)	
ROBERT CHENCINSKI,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices LAMPKIN and REYES concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's post-conviction petition affirmed where defendant's claim of actual innocence lacked an arguable basis in law and in fact.

¶ 2 Defendant, Robert Chencinski, appeals from an order of the circuit court of Cook County summarily dismissing his petition for post-conviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He maintains that he raised an arguable claim of actual innocence based on the affidavit of a codefendant who took sole responsibility for the offense. He also contends that the order is void as a partial dismissal prohibited by

People v. Rivera, 198 Ill. 2d 364, 371 (2001), because the circuit court ruled on only two of his three post-conviction claims and failed to address his actual innocence claim.

¶ 3 The record shows that defendant and Kristina Korus, who is not a party to this appeal, were charged with the July 24, 2006, burglary of an automobile that was parked in a driveway at Saint Elizabeth Hospital in Chicago. They were tried in simultaneous, but separate, proceedings, and both were found guilty of that offense. Defendant was then sentenced on his jury conviction to a Class X term of 15 years' imprisonment, to be served concurrently with the seven-year terms imposed on his plea convictions of three unrelated pending charges. Defendant's subsequent attempt to withdraw those pleas was ruled untimely, and he then filed notices of appeal from both judgments. These cases were consolidated for review and the judgments affirmed. *People v. Chencinski*, No. 1-08-0017, 1-08-1034 (2010) (cons.) (unpublished order under Supreme Court Rule 23).

¶ 4 On November 3, 2010, defendant filed the post-conviction petition at bar, solely relating to his burglary conviction. In his *pro se* petition, defendant alleged that he did not receive effective assistance of counsel, that the trial court was "selective in the information withheld and given to the jury[,]" and "Newly acquired Affidavit from Co-Defendant."

¶ 5 In support of his petition, defendant filed his own affidavit in which he identified several omissions of trial counsel that denied him effective assistant of counsel, and several occasions during which the trial court "withheld" information from the jury. Defendant also averred that his codefendant had recently come forward "and admitted her guilt in the offense" and provided an "affidavit" taking "full responsibility." That document, dated August 1, 2010, was handwritten and signed by Korus, but not notarized. In it, she states, in pertinent part:

> "On 7-24-2006 at about 12:30 pm[,] of my own free will, I reached through an open window of a truck to retrieve what I thought

> [were] two phones, [but] they were remotes. Officer Kenneth Ruibis came between myself and Oscar Limbel, the owner, along with *** two security guards *** [and] recovered *** two remotes from my bag. It wasn't [until] then that [defendant] came out of the hospital and walked over to see what was going on. Later that day I spoke to detectives Ken Berris and Brian Tedeschi. I told Ken Berris what I did on my own but the detectives seemed more concerned on how to implicate [defendant]. I wasn't ever asked if he was involved, I was told he was. I even told the detectives that I set off the alarm on the truck as I reached in."

¶ 6 On January 25, 2011, the circuit court entered a written order dismissing defendant's petition on its finding that the issues raised and presented by defendant were frivolous and patently without merit. In reaching that conclusion, the court specifically found that defendant's claims regarding counsel were "entirely conclusory" and devoid of facts to support his contentions, and that his claims regarding the court were also legally insufficient because he had not supported them with the required affidavits, records, or other evidence, or provided an explanation for their absence.

¶ 7 Defendant now challenges that ruling on appeal. He contends that his petition should advance to second stage proceedings because he raised an arguable claim of actual innocence based on the statement of Korus. He also contends that the circuit court failed to address his claim regarding actual innocence, and thus, the summary dismissal order is void as an improper partial dismissal. Because defendant has concentrated his arguments solely on his claims related to the statement of Korus, we initially find that he has abandoned the remaining arguments made

in his post-conviction petition and forfeited them for appeal. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 8 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Although defendant need only set forth the "gist" of a constitutional claim at the first stage of proceedings (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)), section 122-2 of the Act requires that the petitioner clearly set forth the respects in which his constitutional rights were violated, and attach affidavits, records or other evidence supporting the allegations or an explanation for their absence (725 ILCS 5/122-2 (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). If the circuit court finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or in fact, it must dismiss the petition in a written order. 725 ILCS 5/122–2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10, 16). We review the summary dismissal of a post-conviction petition *de novo* (*People v. Coleman*, 183 Ill. 2d 366, 388 (1998)), and may thus affirm on any ground substantiated by the record, regardless of the trial court's reasoning (*People v. Lee*, 344 Ill App. 3d 851, 853 (2003)).

¶ 9 Defendant first contends that the court erred in dismissing his petition because he raised a claim of actual innocence that had an arguable basis in fact and in law. The State disagrees, and asserts that summary dismissal was appropriate where defendant's claim was refuted by the record.

¶ 10 The State observes that defendant did not directly assert in his petition that he was actually innocent of the offense or that he was not there when it took place. Rather, he simply averred that Korus provided a statement in which she has "admitted her guilt [and taken] full responsibility[,]" thereby insinuating that Korus acted alone. These observations are borne out by the record.

¶ 11 In his verified and notarized petition, defendant did not specifically allege that he was innocent of the burglary, nor did he explain his presence at the scene. He merely referenced his codefendant's "affidavit taking full responsibility." The State also correctly points out that Korus' unnotarized statement does not constitute a valid affidavit (*Roth v. Illinois Farmer's Insurance Co.*, 202 Ill. 2d 490, 496 (2002)); and although this factor may not be dispositive at the first-stage of proceedings (see *People v. Wilborn*, 2011 IL App (1st) 092802, ¶¶ 69-72 and cases cited therein), we find that defendant failed to set forth a claim of actual innocence that has an arguable basis in fact.

¶ 12 Defendant's premise, that his codefendant was solely responsible for the burglary, is clearly contradicted by the trial record. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001). In his post-arrest statement to police, defendant admitted that he reached into the vehicle and took out the radio faceplate and remote controls to support his heroin habit. The victim, Oscar Limbel, testified that he saw defendant inside his vehicle, and Korus standing three feet away. Limbel also testified that he confronted defendant and Korus, and Korus told him that "we" did not have his radio. Korus then opened her purse to show him, and Limbel was able to see the stolen items in her purse. Thus, defendant's assertion of actual innocence clearly lacks an arguable factual basis, subjecting his petition to dismissal at the first stage of proceedings. *People v. Jones*, 399 Ill App. 3d 341, 362 (2010).

¶ 13 Defendant's claim also lacks an arguable basis in law. To assert a claim of actual innocence based upon newly-discovered evidence, defendant must show that the evidence was: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009).

¶ 14 Evidence is newly discovered when it has been discovered since trial and could not have been discovered earlier in the exercise of due diligence. *Ortiz,* 235 Ill. 2d at 334. Defendant claims that the evidence is newly discovered because Korus was on trial herself, and cites *People v. Molstad*, 101 Ill. 2d 128, 135 (1984), for the proposition that "no amount of diligence" can force a codefendant to violate her fifth amendment right to avoid self-incrimination if she chooses not to do so. The State, relying on *Jones*, 399 Ill. App. 3d 341 at 365, maintains that Kuros' statement may not be considered newly discovered because she waited until after the expiration of her sentence of probation to come forward, and this court has previously considered a codefendant's delay in making a statement until it can no longer affect the disposition of his or her case as a factor in determining whether the evidence is newly discovered.

¶ 15 We find this case analogous to *Jones*, and defendant's reliance on *Molstad* misplaced. In *Jones*, 399 Ill. App. 3d at 365, this court distinguished *Molstad* and affirmed the summary dismissal of defendant's post-conviction petition over his actual innocence claim based on a codefendant's affidavit that he was solely responsible for the offense. We found that the codefendant's affidavit did not constitute newly discovered evidence, because, unlike the codefendants in *Molstad* whose affidavits "put themselves at risk [of increasing] their ultimate penalty[,]" the codefendant in *Jones* came forward 17 months after his own trial, and therefore his admissions would "have no bearing on his ultimate disposition." *Jones*, 399 Ill. App. 3d at 365. Similarly here, Korus waited until she completed her sentence to come forward, at a time when her admission could have no impact on her punishment.

¶ 16 We also find that Korus' statement is not of such a conclusive character that it would probably change the result on retrial. As noted, defendant confessed to the burglary, and provided a motive for his actions. He was also seen in the car by its owner, and this testimony

was corroborated by the officer who testified at trial. On direct appeal, we found that the evidence "overwhelmingly demonstrated the defendant's guilt" (*People v. Chencinski*, No. 1-08-0017, 1-08-1034 (2010) (cons.) (unpublished order under Supreme Court Rule 23), and Korus' statement provides no basis for concluding that it would probably change the result on retrial. *People v. Harris*, 206 Ill. 2d 293, 301-02 (2002).

¶ 17 Moreover, Korus does not affirmatively state in her "affidavit" that she would testify to the contents therein. An affidavit must not only identify the source and character of the evidence, it must also identify the availability of the alleged evidence. *Jones*, 399 Ill. App. 3d at 366 (2010), citing *People v. Brown,* 371 Ill. App. 3d 972, 982 (2007). That is clearly lacking in this case. Based on the foregoing, we find that defendant failed to set forth an arguable claim of actual innocence requiring further proceedings, and that the circuit court properly dismissed his petition as frivolous and patently without merit.

¶ 18 Defendant next contends that the trial court entered an improper partial summary dismissal of his petition, because it failed to explicitly rule on his actual innocence claim. *People v. Rivera*, 198 Ill. 2d 364, 371 (2001). This argument has been considered and repeatedly rejected by this court. In *Lee*, 344 Ill. App. 3d at 852, *e.g.*, defendant argued that *Rivera* required reversal of the summary dismissal of his post-conviction petition because the circuit court failed to address one of his claims in its written order. *Lee*, 344 Ill. App. 3d at 855. This court declined to construe the order as a partial summary dismissal and noted that a judgment must generally be construed to give effect to the court's intention and to uphold its validity where supported by the wording of the judgment. *Lee*, 344 Ill. App. 3d at 855. We found that the wording of the order, where the court stated that "the issues raised and presented *** lack sufficient merit to withstand summary dismissal [and] the instant petition for post-conviction relief shall be and is hereby dismissed," showed that the court plainly intended to dismiss the

entire petition. *Lee*, 344 Ill. App. 3d at 852, 855. We find no appreciable difference in the written order in this case, and conclude as in *Lee*, 344 Ill. App. 3d at 855, that the obvious intent of the written order was to dismiss defendant's entire petition.

¶ 19 For the reasons stated, we affirm the order of the circuit court of Cook County.

¶ 20 Affirmed.